

Respondent argues that claimant's accident at work did not accelerate, exacerbate or aggravate her preexisting psychological condition. Further, respondent argues that claimant should be limited to a 9 percent permanent partial impairment to her right upper

extremity pursuant to the rating opinion of Dr. Regina Nouhan. Last, respondent argues that claimant is not permanently, totally disabled.

Claimant asks that the Award of permanent total disability be affirmed. In the alternative she asks for a work disability award of 88.5 percent. Further, claimant asks for an award of ongoing and future medical treatment.

The issues for the Board's review are:

- (1) What is the nature and extent of claimant's physical impairment and disability?
- (2) Did claimant's physical injury accelerate, exacerbate or aggravate her preexisting psychological condition? If so, what is the nature and extent of claimant's psychological impairment and disability?
- (3) Is claimant permanently, totally disabled? If not, is claimant entitled to a permanent partial disability award based on work disability?
- (4) Is claimant entitled to ongoing and future medical treatment?

FINDINGS OF FACT

Claimant went to work for respondent in February 2005 as a cashier when she was 51 years old. She had problems with her hands in March 2005, and an EMG performed on July 13, 2005, showed that claimant had borderline carpal tunnel syndrome (CTS) on the right. The EMG on the left was normal. On July 24, 2005, a large, heavy box fell on her hands, after which she felt pain in her arms and hands. Claimant reported her accident and was sent to St. Francis Medical Center for treatment. She was then referred to Kansas Orthopedics, where she was evaluated and treated by Dr. Gilbert. Claimant continued to work for respondent until December 31, 2005. She has not worked anywhere since her employment at respondent ended.

After a preliminary hearing, Dr. Regina Nouhan, a board certified plastic surgeon and hand surgeon, initially saw claimant on August 10, 2006, for the purpose of an independent medical evaluation requested by the ALJ. After her evaluation, Dr. Nouhan found that claimant suffered from a right trigger thumb; degenerative changes in both hands; and bilateral CTS, worse on the right than the left. Dr. Nouhan's report of August 10, 2006, indicates that claimant's right CTS was diagnosed after she started working at respondent but prior to the incident with the box. Dr. Nouhan said it would not be possible to say whether claimant's CTS developed before or after she began working at respondent, since too many factors are involved.

An MRI of claimant's right wrist on November 14, 2006, showed that claimant had small tears of the right triangular fibrocartilage. Dr. Nouhan could not say whether claimant's triangular fibrocartilage tear was caused by the accident involving the box but said the injury at respondent could have aggravated an asymptomatic triangular fibrocartilage tear and caused it to become symptomatic.

Dr. Nouhan performed a right carpal tunnel release and a steroid injection of the right trigger thumb on claimant on August 17, 2007. She continued to follow up with claimant until early December 2007. Dr. Nouhan saw claimant again on January 13, 2009, at which time she found claimant to be at maximum medical improvement, although stating claimant may need surgery in the future. On February 9, 2009, Dr. Nouhan provided respondent with an impairment rating. Dr. Nouhan found that claimant had loss of range of motion of her right wrist, a triangular fibrocartilage tear, persistent trigger thumb and a residual surgical scar. Using the *AMA Guides*, Dr. Nouhan rated claimant as having a 9 percent permanent partial impairment to the right upper extremity. Dr. Nouhan only operated on claimant's right CTS. She only rated claimant's right wrist, not the left. She said, however, that because left CTS was not documented until after claimant started working at respondent, it would be reasonable to attribute the impairment to her left upper extremity to her work at respondent.

Dr. Nouhan did not place any restrictions on claimant. But the doctor did not say that claimant was not in need of any restrictions. Dr. Nouhan said claimant was at risk for accelerated pain if she worked at a job that required her to do repetitive hand motion, in particular a twisting motion. Nevertheless, she did not specifically restrict claimant from doing those activities in the future.

Dr. Lynn Ketchum, who is board certified in plastic surgery and hand surgery, evaluated claimant's bilateral upper extremities on February 8, 2006, at the request of claimant's attorney. He saw claimant again on May 6, 2008, and May 5, 2009.

On February 8, 2006, claimant told Dr. Ketchum that to some degree, she had problems with her hands and wrists before beginning to work at respondent. Dr. Ketchum reviewed some of claimant's medical records, and the EMG and nerve conduction study done July 13, 2005, showed she had right CTS, and the EMG done December 20, 2005, showed her right CTS had worsened and that she now had CTS on the left as well. Dr. Ketchum did nerve conduction studies on February 8, 2006, which showed the bilateral CTS had continued to worsen. Dr. Ketchum recommended an MRI of both wrists to complete the evaluation of claimant's wrist pain and rule out a triangular fibrocartilage tear.

Dr. Ketchum saw claimant a second time on May 6, 2008. Since he had last seen claimant in February 2006, Dr. Nouhan had performed a right carpal tunnel release and an injection of the right trigger thumb. Claimant had an MRI of her right wrist on November 14, 2006, which showed a tear of the right triangular fibrocartilage as well as tendinitis over

the extensor carpi ulnaris tendon. Claimant also had pain in the left carpometacarpal joint (CMC). Dr. Ketchum opined that claimant needed an arthroscopy and debridement of the right triangular fibrocartilage and an injection of the extensor carpi ulnaris tendon. Dr. Ketchum opined that all of claimant's conditions were related or caused by her work at respondent, with the exception of the left first CMC joint pain. He explained that was usually an age-related issue but could be work aggravated if someone did repetitive pinching. Claimant had no CMC joint issue in Dr. Ketchum's first examination in February 2006.

Claimant saw Dr. Ketchum a third time on May 5, 2009. According to his records, since the last time Dr. Ketchum saw claimant on May 6, 2008, Dr. Nouhan had performed a re-release of her right carpal tunnel¹, but claimant said she still had numbness in her fingers in both hands. She also had weakness in her hands. Claimant told Dr. Ketchum that her left thumb hurts most of the time. Dr. Ketchum said that the left thumb condition was not a work-caused issue but was a work-aggravated issue. Dr. Ketchum continued to believe that claimant needed an arthroscopy and debridement of the triangular fibrocartilage in the right wrist. Otherwise, he considered her to be at maximum medical improvement.

Using the *AMA Guides*, Dr. Ketchum rated claimant as having a 25 permanent partial impairment of the right upper extremity and a 20 percent permanent partial impairment of the left upper extremity. He believed that claimant's job at respondent was the prevailing factor in her developing the problems with her wrists, with the exception that she had a preexisting CTS that had been aggravated by her work. Dr. Ketchum reviewed the task list prepared by Terry Cordray and of the 14 tasks on the list, he opined she was unable to perform 11 for a 79 percent task loss. Dr. Ketchum did not place any lifting or any other type of restriction on claimant as he was not asked to do so. But in analyzing the task list, Dr. Ketchum said she could not do tasks involving constant handling and fingering, such as keyboarding, or repetitive gripping and pinching on a regular basis.

Claimant continues to have problems with extreme heat and cold weather. Door knobs are difficult for her. When driving for long distances, her hands and arms go numb. She has trouble brushing her teeth, tying her shoes, and combing her hair. She can only write a few lines and sign her name. She uses voice recognition on her computer because she cannot type for long.

Claimant testified that as a result of her physical injury to her hands, she also developed psychological issues. She noticed she experienced sadness, she cried easily, and had problems with irritability, especially after realizing she will never work again. Claimant previously had issues with depression, but she said they were isolated incidents

¹ None of Dr. Nouhan's records show she performed a re-release surgery, and she did not testify that a re-release procedure was performed on claimant's right hand.

and did not keep her from working. Her problems with depression became worse after her injury at respondent and affected her daily activities.

Claimant admitted that both her parents were alcoholics but described her childhood as “ecstatic,” “very happy,” and “extremely happy.”² However, she also stated she had been molested by her brother for a period of 3 to 5 years. She was seen by Dr. Segerson at Menninger Clinic when she was in high school, but she was being evaluated for migraine headaches after fainting in school. Claimant denied that evaluation was due to any mental health issues. Claimant is a high school graduate, although she was forced to leave school early because she was pregnant. Claimant acknowledged a suicide attempt at age 17 but described it as a cry for attention rather than an attempt to kill herself.

Claimant attended Washburn University and received an associate degree in criminal justice in 1996. She received a bachelor’s of science degree in human resources from Friends University in 2000 and a masters degree in information systems from Friends University in 2002.

Robert Barnett, Ph.D., a clinical psychologist, met with claimant on two occasions, May 14, 2009, and January 8, 2012, both at the request of claimant’s attorney. On May 14, 2009, Dr. Barnett said that claimant’s affect was high and she appeared anxious, but she was cooperative. Claimant told Dr. Barnett she was taking Ambien, Pristiq³, Lithium, and Adderall. Claimant told Dr. Barnett that she had taken many different antidepressants in the past.

Dr. Barnett did a mental status examination to assess and describe claimant’s mental functioning at that time. He noted that claimant was mildly guarded. Claimant described herself as close to thoughts of suicide, although she was not having suicidal ideation and had no plan or intention to commit suicide. Claimant admitted to crying easily and daily. She slept five to six hours at night and took naps during the day, which Dr. Barnett said was a disturbed sleep pattern. Claimant said she had a poor appetite and denied having any enjoyable activities. She had an increased temper. All were signs and symptoms of depression.

Dr. Barnett said claimant’s thought processes were logical and coherent. She complained of memory problems and at times of being mildly confused. Dr. Barnett thought possibly her memory problems were associated with the medication she was taking. Claimant was given a Brief Symptom Inventory, which Dr. Barnett found indicated generalized distress rather than specific psychopathology. He also stated that an

² Cruse Depo. at 12.

³ Claimant said she was unfamiliar with Pristiq, which is an anti-depressant, and Dr. Barnett may have mistakenly put that medication on the list.

examination of the elevated scales within the profile suggested pronounced difficulties with depression and anxiety. This was also true of the results of the Minnesota Multiphasic Personality Inventory -2 (MMPI-2). Although the MMPI-2 also suggested an over-concern with physical functioning or bodily functions, given claimant's history of injury, Dr. Barnett did not believe claimant had a somaticizing disorder.

Based on the interview process, testing, and records Dr. Barnett reviewed, he diagnosed claimant with moderate to severe dysthymic disorder, late onset. Dysthymic disorder means it is secondary to some sort of injury or loss, and he described claimant's disorder as being associated with physical problems. Dr. Barnett stated that although claimant's psychiatric history indicates she had treatment for depression in the past, her description of her symptoms since her injury suggests that she has new symptoms as well as an exacerbation of her old symptoms. He said that a physical injury can aggravate psychiatric conditions.

Claimant told Dr. Barnett she did not relate well with peers while growing up. Claimant told him she attempted suicide when she was 17. He knew claimant had been prescribed Lithium, a mood stabilizer, in 1979. He knew she had a history of suicidal ruminations that existed even before her accident. She told him she had recent thoughts of suicide that she related to her loss of function, which Dr. Barnett said would make them at least indirectly related to her work accident.

Dr. Barnett said at the time he saw claimant, she was displaying moderate deficits in thinking, perception, judgment and affective behavior, and he believed her potential for rehabilitation was good for partial restoration. Using the *AMA Guides*, second and fourth editions, Dr. Barnett classified her as being in Class III, moderate impairment, for an impairment of 25 to 50 percent. He opined that claimant's impairment would be closer to 25 percent than 50 percent. Dr. Barnett believed claimant's impairment was directly traceable to the physical injury and/or aggravating of preexisting conditions caused by the physical injury. He also said that 5 percent of his 25 to 50 percent rating would be impairment that preexisted her date of accident.

Dr. Barnett saw claimant again on January 8, 2012, at which time they focused on things that might have changed since he saw her in May 2009. Claimant was still experiencing symptoms of dysthymic disorder. He did not see signs of guardedness and irritability such as he saw in his first interview. Given his subsequent interview, Dr. Barnett believes the impairment rating he issued in May 2009 was still accurate. Regarding claimant's ability to work, Dr. Barnett said he is not a medical doctor so he could not assess her physical condition. Although claimant complained of memory problems, he believed those were related to medication, and she was not taking as much medication in January 2012. He did not see any evidence of confusion or difficulty with concentration. He believed she was cognitive and capable of simple repetitive work tasks but would have

difficulty with complex tasks. Claimant told him the reason she could not work was because of the problems with her hands and because she felt afraid of people.

Dr. Barnett said it was his impression that claimant's family was unhappy due to her parents' alcoholism. He did not ask claimant how that alcoholism affected her in her early years and did not believe it was of any particular interest to her at the time of the interviews. Claimant told him she had been sexually molested by a family member while growing up but refused to disclose the nature of the molestation. He acknowledged that molestation at an early age can serve as a gateway to other psychological issues. However, he did not think it important to have more information regarding her molestation in evaluating her psychologically. Claimant did not tell Dr. Barnett that she became pregnant when she was 17 years old. Dr. Barnett said that a teenage pregnancy can have psychological affects on an individual. Claimant did not tell him she married into a physically abusive relationship. Claimant told Dr. Barnett that her son had a mental illness but did not give his diagnosis.

Dr. Barnett believed claimant could benefit from psychotherapeutic intervention with a qualified mental health professional.

Melvin Berg, Ph.D., a psychologist, performed a psychological evaluation of claimant at the request of respondent. He originally met with claimant on May 21, 2010. However, in meeting with claimant, she was not agreeable to providing Dr. Berg with significant information he thought was necessary to perform a valid psychological evaluation. Claimant returned on November 3 and November 9, 2010, to complete her evaluation with Dr. Berg. After reviewing medical records and evaluating claimant, Dr. Berg said that claimant suffered from a psychological condition, probably a bipolar disorder. He testified that claimant's psychological condition was not related to her work injury. He said her medical records indicated a psychological condition that predated the injury. He further said a preponderance of evidence, primarily her medical records, did not show she had an exacerbation of her psychological disorder as a result of her work injury.⁴

Dr. Berg reviewed medical records of Dr. Ed Levy from the period of January 27, 1989, through June 14, 2002. Dr. Levy's records indicate that claimant saw Dr. Stuart Twemlow for family stress in concert with family members, and Dr. Twemlow prescribed psychotropic medications for her, including Lithium. The records further indicate that Dr. Levy prescribed psychotropic medications for claimant starting in the 1990s up until 2002.

Dr. Berg said a review of claimant's medical records showed she sought treatment from Valeo Behavioral Healthcare from 2002 through July 22, 2009. Claimant testified she

⁴ Dr. Berg said the information provided to him by claimant was often inconsistent with what she reported to others, including what she provided to Dr. Barnett. For that reason, Dr. Berg gave significant weight to the historical evidence documented in her medical records.

only went to Valeo to get prescriptions for her medications, but Dr. Berg testified the records indicate she received some other treatment.

Dr. Berg further reviewed records from the Marian Clinic wherein claimant reported a history of Hepatitis C and that she was seeing Dr. Sharma at Valeo. Claimant told the Marian Clinic she was taking Depakote as a treatment for mania. Dr. Berg said that the medical records indicate that her treatment for psychological disorders had stopped by the time he saw her in November 2011, which he said was suggestive that she no longer felt in need of medication or treatment.

Dr. Berg agreed that a physical injury that renders a person unable to work would have an affect on a person's psychological well being and that pain and physical inability to use the hands can affect a person's mood. Dr. Berg stated that claimant's medical records make reference to carpal tunnel syndrome predating her employment and make reference to pain and swelling in her hands before her employment. Dr. Berg said claimant felt the injury caused her to become more depressed. Claimant told him she was more depressed now than she was before her injury. The notes from Valeo include a quote from claimant wherein she said she was "devastated" by the loss of her job at respondent.⁵ She told Dr. Berg her termination from respondent was a setup because she was called in for an evaluation and kept in the interview for 5 1/2 hours, which she said could have caused her to break the 6-hour rule concerning lunch. She said she left the interview to clock out for lunch and was then terminated for leaving the interview before it was finished.

In formulating a conclusion regarding claimant's condition prior to the injury, Dr. Berg said he relied on observations and conclusions in the medical record that were repeated consistently over time. He was relying on observations of other doctors who have not testified in this case.

Dr. Berg said there is no evidence of a deterioration of claimant's psychological functioning other than claimant's own report. Dr. Berg said he did not have enough information to formulate an opinion or conclusion about claimant's ability to work.

Terry Cordray, a certified rehabilitation counselor, interviewed claimant on May 3, 2010, at the request of claimant's attorney. Mr. Cordray compiled a list of 14 tasks that claimant performed in the 15-year period before her work-related accident.

At the time of the interview, claimant was 56 years old. Although she had a bachelor's degree, she had never been able to use that degree in a job. She had been described by Dr. Barnett as having a psychological condition that was moderate to severe.

⁵ Berg Depo., Ex. 3 at 8.

She has had 14 or 15 jobs in the last 15 years⁶ and has not been able to maintain a job or function effectively on a job for a long term. Claimant has lost the ability to use her upper extremities, which prevents her from doing all the work she has done in the past. Considering all those problems in combination with her injury and restrictions to her upper extremities, Mr. Cordray opined claimant would not be placeable into a job.

If the psychological equation were removed from this case, Mr. Cordray still thinks claimant would have significant employability problems and would be totally disabled based on the combination of her age and the fact that she cannot perform any of her previous work because of her physical problems. He said her medical condition precludes her ability to operate a cash register or stock shelves. She could not do typing, keyboarding or other clerical jobs.

Michael Dreiling, a vocational rehabilitation consultant, met with claimant on June 22, 2011, at the request of respondent for the purpose of providing a vocational assessment. Claimant was 58 years old and was receiving Social Security disability benefits (SSDI). Claimant was wearing wrist braces on both wrists at the time of the interview. She was not employed. Mr. Cordray noted that claimant had a sporadic work history and had been terminated from several of her previous jobs. Claimant's job history included various types of jobs: purchasing, data entry, hair styling. At the time of the interview, she said she could only use her personal computer for about an hour at a time.

Claimant told Mr. Dreiling she had previously sought SSDI in 1997, 2002 and 2005 and then discontinued those proceedings when she began working for respondent. Claimant said her basis for applying for disability was a combination of physical and emotional issues. Claimant testified that in 1997, 2002 and 2005, she participated in Kansas Vocational Rehabilitation Services and as part of that program, she was required to apply for SSDI.

Mr. Dreiling said he did not note claimant had any permanent medical restrictions based on claimant's July 2005 work injury. He noted she appeared to have significant psychological issues. Mr. Dreiling said it appears claimant's psychological issues are interfering with her ability to return to work. Absent any medical restrictions of a physical nature, Mr. Dreiling assumed claimant would be able to work if the psychological component was removed. Mr. Dreiling, however, concluded that claimant was essentially and realistically unemployable as of the time he met with her. He acknowledged she was working until the time of her injury and had applied for SSDI previous to her employment at respondent but did not receive it until after her injury.

⁶ Mr. Cordray testified claimant had 14 or 15 jobs in the 15-year period before her accident, but a count of the jobs listed in his report shows a total of 28 jobs in that period.

PRINCIPLES OF LAW

K.S.A. 2005 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2005 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁷ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.⁸ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁹

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

⁷ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

⁸ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁹ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

In *Casco*,¹⁰ the Kansas Supreme Court held:

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

In *Love*,¹¹ the Kansas Court of Appeals held:

In order to establish a compensable claim for traumatic neurosis under the Kansas Workers' Compensation Act, K.S.A. 44-501 *et. seq.*, the claimant must establish: (a) a work-related physical injury; (b) symptoms of the traumatic neurosis; and (c) that the neurosis is directly traceable to the physical injury. . . .

ANALYSIS

The ALJ relied on the opinions of Dr. Robert W. Barnett. Dr. Barnett diagnosed claimant with dysthymic disorder, which is a disorder secondary to injury or loss. Claimant's July 24, 2005, injury was the injury which Dr. Barnett believed gave rise to the dysthymic disorder. His opinions were largely premised on claimant's statements that following her work-related accident, she had symptoms of tearfulness, feelings of

¹⁰ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, Syl. ¶ 8, 154 P.3d 494 (2007).

¹¹ *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, *rev. denied* 245 Kan. 784 (1989); see *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998); *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994).

worthlessness, difficulty sleeping, weight gain, anger and irritability, no interest in enjoyable activities, and self isolation.

Dr. Melvin Berg diagnosed claimant with bipolar disorder. He opined an objective review of claimant's medical records does not show an increase in symptoms or an aggravation of her psychological disorder after the July 24, 2005, accident. Dr. Berg relied less on claimant's statements that her psychological condition worsened after her accident and placed more weight on claimant's medical records.

Dr. Berg's report indicated claimant has had a long history of psychological issues. Claimant saw Dr. Ed Levy on what appears to be an irregular basis from 1989 through June 2002. In 1989, Dr. Levy prescribed claimant Prozac for depression. In January 1996, Dr. Levy and claimant discussed her depression and the usefulness of Lithium. On January 18, 1996, Dr. Levy prescribed claimant Paxil for depression. A note in Dr. Levy records discussed a June 2002 laboratory report measuring claimant's Lithium levels.

Records from Stormont Vail Health Care from 2001 and 2002 indicated claimant had a previous history of depression and had been on Lithium. On October 8, 2001, claimant told Dr. Robert W. Braun that she was receiving psychological treatment, occasionally became depressed, and took antidepressants. Dr. Braun indicated claimant reported she continued to use intravenous cocaine.

Dr. Berg's report stated that claimant received psychological treatment from Valeo Behavioral Health Care from June 2002 through July 2009. A treatment note from June 24, 2002, described claimant's presenting problem as a personality disorder with an anxiety level extremely high around other people. She also had been unable to maintain employment, had angry outbursts, tangential thoughts, felt persecuted and had an inability to concentrate. She also reported having been arrested several times, once on drug charges. A July 16, 2002, progress note from Valeo indicated claimant was diagnosed with bipolar and personality disorder. In August 2004, Dr. Sharma, a psychiatrist at Valeo, diagnosed claimant with bipolar disorder. Claimant reported to him she overdosed on Lithium and Klonopin in 2001.

A letter written to Dr. Sharma on January 11, 2005, by claimant gives additional insight on her history of psychological treatment. In that letter, claimant reported receiving treatment from Menninger's in 1968 and believed that is when her bipolar and depression first occurred. The letter also stated she had been prescribed Lithium by a physician in 1974 or 1975. Claimant also indicated in the letter she worked for the State of Kansas for four years, beginning in 1974. She said she was lucky to work there that long, as before and since then she was plagued with a history of unsuccessful work attempts. In the letter, claimant also reported crying spells of more than three times a week and feelings of guilt.

The undersigned majority of Board Members find the opinions of Dr. Berg concerning the diagnosis and causation of claimant's psychological condition more credible than those of Dr. Barnett. Dr. Barnett unduly relied on the statements of claimant in forming his opinions, while Dr. Berg gave more credence to the history contained in claimant's past medical records. Claimant told Dr. Barnett that she had no history of chronic or severe illness. However, claimant's medical records, reviewed by Dr. Berg, indicated claimant had Hepatitis C. She told Dr. Barnett of having a positive work history, but again the medical records reviewed by Dr. Berg reveal otherwise. The report of vocational expert Terry Cordray indicated claimant held 28 jobs in the 15-year period before her accident. Dr. Barnett's report indicated claimant denied a history of alcohol or drug abuse, but claimant's medical records clearly contradict that statement.

For many years prior to July 24, 2005, claimant had the same psychological symptoms that she attributed to her work related accident. Both before and after the accident claimant had crying spells, anger and irritability. Claimant told Drs. Barnett and Berg she was taking Lithium, a drug she took as early as 1974. Dr. Berg found it significant that claimant's treatment record at Valeo after July 24, 2005, contains only brief references to the accident and its effect on her. Admittedly, Dr. Barnett conducted psychological testing of claimant, while Dr. Berg did not test claimant. However, those tests only provided a picture of claimant's psychological condition on the date of the tests, not her psychological condition before her work related accident.

The majority of Board Members concur with the finding that claimant is permanently and totally disabled. If claimant's psychological injuries are not work related, that leaves respondent's bilateral carpal tunnel syndrome as her only work related injury. There is a statutory presumption under K.S.A. 44-510c(a)(2), that a worker who suffers a loss of both hands is permanently and totally disabled. Respondent contends it is claimant's preexisting psychological issues that prevent claimant from engaging in substantial and gainful employment, not her physical injuries. If the psychological component of the claim is removed, respondent argues claimant is essentially and realistically employable. It cites the opinions of vocational expert Terry Cordray.

*Wardlow*¹² requires the factfinder to take into consideration age, training, previous work history, and physical limitations when determining if an employee is permanently and totally disabled. *Wardlow* also obligates the factfinder to consider the totality of an employee's circumstances, including driving and lack of transportation problems, being in constant pain, and having to change body positions. Here, claimant has significant preexisting psychological issues. Despite those preexisting psychological issues, claimant was able to work for respondent until her 2005 accident. Mr. Cordray believed that if the psychological component were removed, claimant would still have significant employability problems. Dr. Ketchum indicated claimant had a loss of key pinch and grip strength. He

¹² *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

opined claimant had a 79 percent task loss, which is significant. Simply put, when the totality of claimant's situation is considered, she is permanently and totally disabled based solely upon her physical limitations in existence after the accident.

The finding that claimant is entitled to an award of permanent total disability compensation renders moot the issues concerning the percentage of claimant's wage and task loss or permanent partial disability. It also renders meaningless the claimant's percentages of functional impairment for purposes of calculating the permanent disability compensation award. Nevertheless, the Board agrees with the ALJ's finding that claimant suffered permanent injuries to her bilateral upper extremities and finds the opinions of Dr. Ketchum are the most persuasive as to the percentages of impairment for those injuries.

CONCLUSION

As a direct result of claimant's work-related physical injuries, claimant is now permanently and totally disabled and is entitled to an award of compensation based on a permanent total disability.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated March 19, 2012, is modified to find claimant's permanent total disability is a result of her physical injuries but is otherwise affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENTING AND CONCURRING OPINION

The undersigned Board Members agree with the majority's finding that claimant is permanently and totally disabled. However, we disagree with the majority that claimant's preexisting psychological condition was not aggravated by the work-related bilateral upper extremity injuries. We likewise do not agree with the ALJ's finding that the presumption of permanent total disability is rebutted by a lack of specific permanent work restrictions. Dr. Ketchum's task loss analysis and opinion is clear evidence of permanent restrictions and limitations. The undersigned Board Members believe claimant's inability to engage in substantial gainful employment is primarily due to the worsening of her psychological condition, which was aggravated as a direct result of the work-related physical injuries. Although claimant had psychological problems as well as other injuries and conditions that preexisted her work-related injuries in this case, claimant did not have prior work restrictions imposed and she was able to work, attend college and even earn an advanced degree. Now, as a result of her injury, she has limitations and impairments that have rendered her unemployable. Furthermore, unlike with a permanent partial disability, when determining whether an injured worker is permanently and totally disabled from engaging in substantial gainful employment in the open labor market, the factfinder does not view the work injuries and restrictions in isolation. Instead, consideration must be given to the whole person. An individual's age, education, training, work experience, communication and social skills, as well as overall physical condition, can all contribute to whether that individual is employable in the open labor market.

The undersigned Board Members agree with the ALJ and with the opinions expressed by Dr. Barnett that claimant's preexisting psychological impairment was permanently aggravated as a direct result of the work-related physical injuries and her percentage of permanent functional impairment attributable to that worsening is, at a minimum, 25 percent to the body as a whole with 5 percent of that attributable to her preexisting condition. As previously stated, this worsening rendered her realistically unemployable. Both vocational experts, Mr. Cordray and Mr. Dreiling, agree that when all factors are considered, including claimant's psychological condition, she is realistically unemployable.

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